

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs April 10, 2007

**MICHAEL R. MARTIN v. STATE OF TENNESSEE**

**Direct Appeal from the Criminal Court for Davidson County**  
**No. 2002-A-587     Steve R. Dozier, Judge**

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**No. M2006-01371-CCA-R3-PC - Filed June 6, 2007**

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The petitioner, Michael R. Martin, appeals the denial of his petition for post-conviction relief, arguing his trial counsel was ineffective for failing to adequately confer with him before trial and for failing to object to the State's improper rebuttal argument. Following our review, we affirm the denial of the petition.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

ALAN E. GLENN, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and DAVID G. HAYES, J., joined.

David G. Hirshberg, Nashville, Tennessee, for the appellant, Michael R. Martin.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Amy Eisenbeck, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**FACTS**

The petitioner was convicted by a Davidson County Criminal Court jury of one count of rape and one count of sexual battery and was sentenced by the trial court to an effective sentence of ten years in the Department of Correction. His convictions and sentences were affirmed by this court on direct appeal, and our supreme court denied his application for permission to appeal. See State v. Michael Ricardo Martin, No. M2004-00455-CCA-R3-CD, 2005 WL 1521973, at \*1 (Tenn. Crim. App. June 24, 2005), perm. to appeal denied (Tenn. Dec. 5, 2005). Our direct appeal opinion reveals that the victim in the case was the fifteen-year-old, mildly mentally retarded daughter of the petitioner's former girlfriend. Id. According to State's proof at trial, the victim had gone upstairs to her bedroom to sleep when the petitioner came to the home and was admitted by the victim's

younger brother. Id. A short time later, the victim's older sister went upstairs and discovered the petitioner lying on top of the victim in her bed with his penis in her anus. Id.

\_\_\_\_\_ On January 31, 2006, the petitioner filed a *pro se* petition for post-conviction relief. Post-conviction counsel was appointed and, on April 5, 2006, filed an amended petition for post-conviction relief. In both the original and amended petitions, the petitioner raised the claim of ineffective assistance of counsel, alleging, among other things, that trial counsel was ineffective for failing to adequately confer with him prior to trial and for failing to object to the State's improper closing argument.

At the May 24, 2006, evidentiary hearing, trial counsel testified that he was retained by the petitioner's family three or four weeks before the trial. Counsel met with the petitioner at the Criminal Justice Center, where he was being held, to discuss the case. He could not recall the exact number of times he met with the petitioner prior to trial but testified that in his meetings he discussed the ten-year plea offer by the State, the indictment, the possible sentences, the State's proof, and their trial defense theory. He also went over the elements of the crime and discussed whether the petitioner would testify in his own defense. He said that the petitioner chose to reject the ten-year offer and proceed to trial.

Trial counsel testified that the State's proof consisted of inconclusive findings from a rape kit and the eyewitness testimony by the victim's sister. He said that the petitioner had made an inculpatory statement to the victim's brother, which he thought would be brought out at trial, to the effect that he was sorry and it was the gin that made him do it. However, the victim's brother did not mention the statement during his testimony, and trial counsel successfully objected to the State's attempts to lead him into remembering it. Trial counsel agreed that a large part of his defense strategy consisted of an attempt to show that the children of the petitioner's former girlfriend did not like the petitioner and had conspired to fabricate the charges against him. He said that he thought before trial that the petitioner would need to testify in his own defense. However, when the victim's brother forgot to mention the petitioner's damaging statement, he and the petitioner again discussed whether the petitioner should testify and the petitioner decided on trial counsel's advice not to take the stand:

Putting [the petitioner] on the witness stand, in light of the fact we were successful in keeping out of the record his admission at the hospital to the . . . boy, and giving the State an opportunity to cross examine [the petitioner] about this comment, you put him on the stand right there, when you've kept that out, the first question out of [the prosecutor's] mouth is, didn't you say at the hospital, blank, and you have lost everything that you've worked so hard to gain. Putting him on the stand would have been a huge mistake.

Trial counsel testified that he remembered referring to an episode from "The Sopranos" television show in closing argument, to which the State responded by reference to a show called "Predator" on the Discovery Channel. At the request of post-conviction counsel, trial counsel read

aloud a portion of the State's rebuttal argument in which the prosecutor drew an analogy between a predatory animal, who hunts for weakened and diseased prey, and the petitioner, who victimized the smaller, younger, slightly mentally retarded daughter of his ex-girlfriend rather than the older, larger, and stronger daughter. Trial counsel testified that he believed that the State's rebuttal was appropriate in light of the defense theory he had propounded and his closing argument, and he therefore saw no basis for raising an objection. Furthermore, objecting to the analogy, in his opinion, would not have helped the petitioner's case. He explained:

And if I'd have felt like -- I'm fairly competent in trial evidence. That's why I object so much. And if I had felt like I had a reasonable basis to object to the argument, I'd have been up. But what I didn't want to do is I didn't want to call more attention to the argument and give it more credence than it would, otherwise. The Jury had heard the case. If the General arguing the case overshoots the meaning and inferences that can reasonably be drawn from the argument, then the State has hurt its own credibility. If I get up and object to it and call attention to it, then I've done nothing more than shown the Jury that I'm afraid of the comparison between my client and a predator and perhaps agree with the comparison. I didn't want the Jury to draw that inference.

On cross-examination, trial counsel acknowledged that the trial court held a hearing on the record in which the petitioner was advised of his rights and questioned about his decision not to testify.

The petitioner testified that trial counsel met with him only one time before trial. During that meeting, trial counsel asked him questions about the facts of the case but did not talk about the elements of the crime, the possible sentences, or whether he should testify at trial. He also claimed that trial counsel never went over the charges against him and that he did not learn that he had been charged with two counts of rape until trial. He acknowledged that trial counsel talked with him during the trial about whether he should testify and that it was his decision not to take the stand. He said, however, that he thought trial counsel should have also discussed the issue with him before trial. He stated that when the prosecutor compared him to a predatory animal during rebuttal, he looked at trial counsel expecting that he would object, but he instead "just sat there and looked."

On June 2, 2006, the post-conviction court entered an order denying the petition for post-conviction relief. Among other things, the court accredited the testimony of trial counsel over that of the petitioner, finding that counsel had adequately conferred with the petitioner prior to trial and had discussed with him both before and during trial whether he should testify in his own defense. The post-conviction court further found that it was the petitioner's decision not to testify and that trial counsel was not deficient for failing to object to the State's closing argument. In sum, the post-conviction court concluded that the petitioner received "as fair of a trial as any defendant could have," and "was represented by extremely competent and qualified counsel."

## ANALYSIS

\_\_\_\_\_The petitioner contends that trial counsel was ineffective for failing to adequately confer with him prior to trial. Specifically, he asserts that trial counsel did not discuss with him before trial whether he should testify in his own defense. The petitioner further contends that trial counsel was ineffective for failing to object to the State's improper closing argument. The State argues that the record supports the post-conviction court's finding that trial counsel provided effective representation. We agree with the State.

The post-conviction petitioner bears the burden of proving his allegations by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f) (2006). When an evidentiary hearing is held in the post-conviction setting, the findings of fact made by the court are conclusive on appeal unless the evidence preponderates against them. See Tidwell v. State, 922 S.W.2d 497, 500 (Tenn. 1996). Where appellate review involves purely factual issues, the appellate court should not reweigh or reevaluate the evidence. See Henley v. State, 960 S.W.2d 572, 578 (Tenn. 1997). However, review of a trial court's application of the law to the facts of the case is *de novo*, with no presumption of correctness. See Ruff v. State, 978 S.W.2d 95, 96 (Tenn. 1998). The issue of ineffective assistance of counsel, which presents mixed questions of fact and law, is reviewed *de novo*, with a presumption of correctness given only to the post-conviction court's findings of fact. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001); Burns v. State, 6 S.W.3d 453, 461 (Tenn. 1999).

To establish a claim of ineffective assistance of counsel, the petitioner has the burden to show both that trial counsel's performance was deficient and that counsel's deficient performance prejudiced the outcome of the proceeding. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see State v. Taylor, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that same standard for determining ineffective assistance of counsel that is applied in federal cases also applies in Tennessee). The Strickland standard is a two-prong test:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687, 104 S. Ct. at 2064.

The deficient performance prong of the test is satisfied by showing that "counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (citing Strickland, 466 U.S. at 688, 104 S. Ct. at 2065; Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975)). The prejudice prong of the test is satisfied by showing a reasonable probability, *i.e.*, a "probability sufficient to undermine

confidence in the outcome” and that “but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. at 694, 104 S. Ct. at 2068.

Because both prongs of the test must be satisfied, a failure to show either deficient performance or resulting prejudice results in a failure to establish the claim. See Henley, 960 S.W.2d at 580. For this reason, courts need not approach the Strickland test in a specific order or even “address both components of the inquiry if the defendant makes an insufficient showing on one.” 466 U.S. at 697, 104 S. Ct. at 2069; see also Goad, 938 S.W.2d at 370 (stating that “failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim”).

Following our review, we conclude that the record fully supports the findings and conclusions of the post-conviction court. Trial counsel’s testimony, which was accredited by the post-conviction court, established that trial counsel met with the petitioner prior to trial to fully discuss the case, including the elements of the offenses, the State’s proof, their theory of defense, and whether the petitioner should testify at trial. Trial counsel had an additional discussion with the petitioner about his right to testify during trial and, following the State’s presentation of its proof, voir dired the petitioner on the record about his right to testify and his decision in that respect. Trial counsel also adequately explained why he did not object to the State’s closing argument. In sum, the petitioner has not met his burden of demonstrating that trial counsel was deficient in his representation or that he was prejudiced as the result of any alleged deficiency on counsel’s part.

### **CONCLUSION**

\_\_\_\_\_ We conclude that the evidence supports the post-conviction court’s finding that the petitioner received effective assistance of trial counsel. Accordingly, we affirm the denial of the petition for post-conviction relief.

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ALAN E. GLENN, JUDGE